In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1605

LOUIS ZEMLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals (Pet. 8-10) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1970. A petition for rehearing was denied on April 23, 1970 (Pet. 9-10). The petition for a writ of certiorari was filed on May 23, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted on each of the charges contained in the indictment.

STATEMENT

1. After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted on three counts charging interstate transportation of stolen travelers checks from New York to Las Vegas (Count I); uttering forged travelers checks thereafter caused to be transported from Las Vegas to New York (Count II); and possession in Nevada of travelers checks stolen from foreign commerce (Count III), in violation of 18 U.S.C. 2314 and 659. He was sentenced to seven years' imprisonment on each count to run concurrently, with eligibility for parole at such time as the Board of Parole may determine (18 U.S.C. 4208(a)(2)).

The court of appeals affirmed *per curiam*. Its original opinion stated that since petitioner "has not appealed from his conviction on Count III," the court was not required to decide issues regarding counts I and II and exercised its discretion not to do so (Pet. 8). In denying a petition for rehearing, the court noted that while Count III (the possession count) was specified in the notice of appeal, it was not briefed or argued. The court further noted that it was "clear that [petitioner] was guilty of Count III,

which perhaps explains why an appeal was technically taken from the conviction on Count III, but never raised or mentioned in the [petitioner's] brief nor during oral argument" (Pet. 10).

2. The government's evidence showed that in September 1967 travelers checks stolen from a New York pier in April 1967 were being circulated in Las Vegas.[1] A casino cashier, Mrs. Akin, testified that on September 29, 1967, at about 4:30 p.m. she was alerted by a central clearance bureau regarding the checks and given the first four digits of the numbers appearing thereon. Later that evening a man identified as petitioner counter-signed five travelers checks (bearing these first four digits) in her presence and attempted to cash them (Exhibit 6). Mrs. Akin called the clearance bureau and obtained the additional numbers on the stolen checks, which matched those given her by petitioner. She also called the casino manager to the cage. The manager called the local police while the clearance bureau alerted the FBI. Two police officers arrived at the casino within minutes (Tr. 50-54).

One of the officers testified that as he entered the casino the manager pointed out petitioner, who was about to leave, as the person who attempted to cash the checks. Petitioner, seeing the officers, ran out into the street and continued running for approxi-

[1] The checks were part of $620,000 in American Express travelers checks destined for shipment to Germany and stolen by armed robbers in April 1967 (Tr. 18-26, 30-34, 35-39, 43-50, 153).

mately one-quarter of a block where he entered a hotel lobby. The officer, who had the petitioner in sight during the chase, caught up with him and asked him to return to the casino. Petitioner was not then handcuffed (Tr. 84). *Voir dire* examination by defense counsel revealed that at the casino the manager told the officers that petitioner had presented stolen checks to the cashier, Mrs. Akin, who also identified him. Petitioner then produced a driver's license and a social security card both identifying him as Harry Katz, the name he had counter-signed on the stolen checks. After the arrival of detectives, petitioner was taken into the manager's office where he was arrested, handcuffed and taken to the station-house (Tr. 76-82). Among the personal property turned over by petitioner at the station-house were two other full books of stolen checks, numerous empty travelers check books, and a key for room 12 at the Hotel Nomad (Tr. 70-73). A detective called the central clearance bureau and the American Express Company, and then proceeded to the Hotel Nomad where he determined that a Harry Katz occupied room 12. Shortly after midnight (Tr. 103), the detective applied for and obtained a warrant to search room 12. The warrant was executed immediately, and the officer found some forty books of stolen travelers checks valued at $8,100 in the room (Tr. 91-95).

A cashier from another casino, Mrs. Latham, identified petitioner as the man for whom she had cashed five travelers checks (Exhibit 13) stolen from the same shipment. While cashiers from other casinos could not recall who had presented the stolen checks

to them (Exhibits 14, 15 and 16)[2] which were the basis for Count II of the indictment charging transportation from Las Vegas to New York of falsely made and forged securities (R. 2-4), an FBI document expert testified, after comparing the signature "Harry Katz" on booking sheets signed by the petitioner (Exhibit 17) with Exhibits 6, 13, 14, 15 and 16, that in his opinion they were signed by the same person (Tr. 168-169).

ARGUMENT

There is no reason in this case for the Court to determine whether the court of appeals acted within its discretion in relying on the concurrent sentence doctrine (see *Benton* v. *Maryland*, 395 U.S. 784, 791),[3] since the conviction on each count is, in any event, fully supportable.

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[2] These checks bore a stamp indicating that they had been negotiated and accepted by American Express in New York (Tr. 143). While all the cashiers were questioned by the police after the checks were cashed, none testified that the police picked up these checks from the casino and then returned them (Tr. 116, 133, 142). One cashier testified that normally deposits would be made on the shift following the swing shift (4:00 to 12:00 midnight) which all the cashiers involved in this case were working (Tr. 56, 115, 121, 128, 140). The court instructed the jury to acquit as to Count II if it found the police had possession of the stolen checks and then returned them to the casinos for collection (Tr. 271-272).

[3] Petitioner contends that he challenged Count III by virtue of his claim that the search warrant was invalid. This overlooks, however, the fact that the items seized in the search were merely cumulative as to the charge of *possession*, which was fully made out by the checks he presented prior to his

Evidence as to Count I—that petitioner had caused the stolen securities to be transported from New York to Las Vegas—was adequately established by the proof at trial and is in no way challenged in the petition.

The claim that the search warrant was invalid is frivolous. Petitioner was not forced to appear manacled before cashier Akin (see Pet. 4), but was placed in handcuffs only after his arrest. Moreover, it was entirely reasonable to return petitioner to the scene of the crime moments after his attempt to pass the stolen checks was thwarted. This confrontation reduced rather than enhanced the danger of misidentification. See, *e.g.*, the government's brief in opposition in *Almond* v. *United States*, No. 520 Misc., this Term, certiorari denied, 396 U.S. 932.[4]

Petitioner also suggests it was improper for an FBI agent to have shown pictures to Mrs. Akin and Mrs. Latham after his arrest (Tr. 63, 117). The weakness of this argument is indicated by the fact that at trial the defense decided not to call the agent

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arrest (Exhibit 6) and those taken from his person after his arrest (Exhibit 7). It was undisputed at trial—and no claim to the contrary was made on appeal—that these checks were from the stolen New York shipment. At all events, the search warrant was based on untainted evidence (see *infra*).

Whether accurate or not (see Pet. 5, Tr. 297, 300-304, 313), petitioner's assertion that he is on "lifetime parole" in Pennsylvania and subject to recommitment for life, does not seem to depend upon whether the court below sustained his conviction on all the counts or on only one count.

[4] We are providing petitioner's counsel with a copy of our brief in opposition in *Almond*.

who showed the pictures (Tr. 189) and thereafter stipulated into evidence five pictures shown to the witnesses by the agent (Tr. 198-199). There was, thus, no attempt by the defense to establish that the trial identification was suggestive or provided any real danger of misidentification at trial. See *Simmons* v. *United States*, 390 U.S. 377.

Finally, the contention that the charge under Count II (see Pet. 6-7) was not established because these travelers checks were shipped by the casinos to New York after they knew the checks were stolen is refuted by the evidence (see *supra*, p. 5) and was properly left to the jury to resolve (Tr. 271-272).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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